83-464

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL LEE,

Petitioner,

vs.

BERNT A. MONSEN, Deputy Chief of the Elmhurst Police Department, and CITY OF ELMHURST, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is there a point in time when post-termination publication of defamatory remarks becomes sufficiently remote from the termination of employment so as to eliminate the nexus required by the "stigma plus" test?

II. Is a liberty interest subject to a qualified privilege that exists in libel and slander?

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In The

Supreme Court of the United States

October Term, 1983

MICHAEL LEE,

Petitioner,

vs.

BERNT A. MONSEN, Deputy Chief of the Elmhurst Police Department, and CITY OF ELMHURST, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

On June 18, 1981, the Honorable John Powers Crowley of the United States District Court for the Northern District of Illinois, Eastern Division, granted the respondents' motion to dismiss the plaintiff's complaint for declaratory judgment and other relief.

The basis for the United States District Court's decision was that the petitioner had no liberty interest protected by 42 U.S.C. § 1983 after he voluntarily left his employment. Further the court held that any remedy that the plaintiff may have lies in a state tort claim. (the decision of the District Court is reprinted herein as (Appendix B).

On June 20, 1983, the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, affirmed the judgment of the Honorable John Powers Crowley, but not for the same reasoning.

In its opinion, the United States Court of Appeals holds that a liberty interest in connection with defamatory statements following a voluntary separation from government employment may exist except that, in this instance, the post-termination publication of defamatory remarks was sufficiently remote from the termination of employment so as to eliminate the nexus required by the "stigma plus" test (the passage of more than a year between petitioner's resignation and his rejection for employment suggested that no substantial nexus existed to create a protectable liberty interest).

In addition, the United States Court of Appeals for the Seventh Circuit, holds that, assuming a sufficient nexus did exist between the petitioner's resignation and the alleged defamation, nevertheless the action would be barred on the legal theory that a qualified privilege exists under Illinois law whereby an Illinois employer can furnish information about a former employee to other employers. (the decision of the Court of Appeals is reprinted herein as Appendix A).

JURISDICTION

1. The federal question was raised by the petitioner in his complaint for declaratory judgment and other relief alleging that a liberty interest exists in connection with defamatory remarks following a voluntary separation from government employment and that the deprivation of such a liberty interest violates the fifth and fourteenth amendments of the United States Constitution in that his good name, reputation, honesty and integrity has been impaired by false information supplied by the respondents which false information foreclosed employment with the Sheriff's Department of DuPage County, Illinois.

2. That the Petition for Writ of Certiorari was filed within 90 days after the entry of the judgment by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on June 20, 1983.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 2, 1978, the petitioner had voluntarily tendered his resignation from the City of Elmhurst Police Department for the purpose of securing a more remunerative police position.

That, subsequently, the petitioner had applied for a police position with the DuPage County, Illinois Sheriff's Department and that his application for such employment had been rejected because of an adverse recommendation submitted by the Elmhurst Police Department via Bernt A. Monsen, then its Deputy Chief, in correspondence dated October 16, 1979 (reprinted herein as Appendix C).

Thereafter, the petitioner had applied to the Hawthorne Police Department, Hawthorne, California, and had been rejected for a police position on the basis of an adverse recommendation that had been submitted in correspondence dated December 12, 1979, by Deputy Chief Bernt A. Monsen on behalf of the Police Department of the City of Elmhurst, Illinois, (reprinted herein as Appendix D).

That the information contained in the adverse recommendations of October 16, 1979, and December 12, 1979, as submitted by Deputy Chief Bernt A. Monsen in his individual capacity and as an employee and agent of the Police Department of the City of Elmhurst, Illinois, was false.

That, upon learning of the adverse recommendations, the plaintiff contacted Police Chief Maurice Martin of the Police Department of the City of Elmhurst, Illinois, concerning the publication of those adverse recommendations because, prior to the tendering of his resignation to the Elmhurst Police Department, William Payne, former Chief of the City of Elmhurst Police Department, had promised a favorable recommendation to the plaintiff in his effort to seek more remunerative police employment.

That on January 15, 1980, Police Chief Maurice Martin of the Police Department of the City of Elmhurst, Illinois, issued a corrected letter of recommendation (reprinted herein as Appendix E).

Because of that corrected recommendation the plaintiff eventually secured employment with the Hawthorne Police Department, Hawthorne, California.

REASONS FOR GRANTING THE WRIT

I.

A LIBERTY INTEREST VIOLATION DOES EXIST WHEN A POST-TERMINATION PUBLICATION OF DEFAMATORY REMARKS OCCURS WHICH INVOLVES THE "STIGMA PLUS" TEST RESULTING IN THE APPLICATION OF A FIVE YEAR STATUTE OF LIMITATIONS.

Under *Paul v. Davis*, 425 U.S. 985 (1976), the Court holds that a violation of a liberty interest occurs when there has been a stigmatization of a reputation accompanied by a tangible interest loss.

In *Paul v. Davis* the essential requisite that was absent was that the plaintiff had not alleged of the loss of any status.

In the instant matter, the petitioner asserts more than a loss of mere reputation when he alleges a foreclosure of employment opportunity with the Sheriff's Department of DuPage County because of false information released by the respondents which information resulted in a loss of employment opportunity with that department.

As a result, the factual situation presented herein differs from that of *Paul v. Davis* with the result that the petitioner has stated a liberty interest violation even though his matter is not the typical case that concerns dissemination of adverse information about an employee following a voluntary separation from government. *Huff v. Butler*, 524 F. Supp. 751 (1981).

In *Huff v. Butler*, the court recognized a liberty interest violation relating to a stigmatization of Huff's reputation following his involuntary resignation.

At the same time, the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, likewise acknowledges that a liberty interest may exist in connection with defamatory statements following a voluntary separation from government employment as is stated in its opinion when it asserts that it affirms the district court's decision except for a different reason then was enunciated by the district court.

However, the United States Court of Appeals then determines that there must be a nexus between the post-termination publication of the defamatory remarks that is not sufficiently remote from the termination of employment.

It is the petitioner's contention in this Writ of Certiorari that a liberty violation should be subjected to a five year statutory limitation as provided under Illinois law rather than being subjected to the type of test that is suggested in the United States Court of Appeals' decision.

Under Illinois Revised Statutes, chapter 83, section 16, the following language is found:

> Except as provided in Section 2-725 of the "Uniform Commercial Code", 1 approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, 2 actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action occurred.

In conjunction with the above statute of limitation, *Waters v. Wisconsin Steel Works of International Har-*

vester Co., 427 F.2d 476 (C.A. 1970). holds that in civil rights litigation the five year statute of limitations applies.

Whether or not one year has passed, as it did in this instance, between the post-termination dissemination of the defamatory remarks and the termination of employment, is immaterial in that the cause of action is governed by a five year statute of limitations, and therefore the liberty violation should not be barred by the type of nexus that is described in the United States Court of Appeals' decision.

Liberty interests are protectable interests that cannot be circumvented or abridged, since they are fundamental rights that are protected by the fifth and fourteenth amendments of the United States Constitution. *Board of Regents of State Colleges v. Roth*, 33 L.Ed.2d 548 (1972).

Therefore, on the basis of the argument heretofore advanced, the petitioner has stated a liberty interest that must be acknowledged under the Constitution of the United States.

II.

A LIBERTY INTEREST IS NOT SUBJECT TO A QUALIFIED PRIVILEGE THAT EXISTS IN LIBEL AND SLANDER.

The petitioner's liberty interest as described in the Writ of Certiorari should not be subjected to the qualified privilege that exists in libel or slander action.

In its opinion the United States Court of Appeals stresses the fact that the plaintiff has failed to allege a deprivation of a right or status conferred by source such as state law.

However, although the plaintiff does not state that he has a property right nevertheless he does have a liberty right and that liberty right must be protected. *Owen v. City of Independence, Missouri*, 100 S.Ct. 1398 (1980); *Larry v. Lawler*, 605 F.2d 954 (1978).

As a consequence, since the petitioner alleges a liberty interest violation that is a protectable interest via the fifth and fourteenth amendments of the United States Constitution, such an interest is not subject to the type of qualified privilege that is expressed in libel or slander.

Libel and slander are causes of action that relate to different type legal theories which are not liberty interest concepts that are founded upon constitutional grounds.

A suit for libel or slander may be maintained without a loss of employment, but a liberty interest can only be maintained if there is an alteration of a status which is a foreclosure of employment.

Therefore, the qualified privilege should not be the basis to bar a civil rights violation in terms of a liberty interest deprivation when there is more involved than an adverse publication affecting one's reputation—such as loss of employment resulting in a denial of a liberty.

For the reasons advanced herein, the petitioner contends that his liberty interest violation should be recognized.

CONCLUSION

For the reasons given, this petition should be granted.

Respectfully submitted,

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioner

September 16, 1983

APPENDIX A

[Unpublished Order Not To Be Cited Per Circuit Rule 35]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

[Submitted April 21, 1983)*

June 20, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

MICHAEL LEE,

Plaintiff-Appellant,

No. 81-2139 vs.

BERNT A. MONSEN, Deputy Chief of the City of Elmhurst Police Department, and CITY OF ELMHURST, ILLINOIS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-6924—**John Powers Crowley**, *Judge.*

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* After preliminary examination of the briefs, the Court notified the parties that it had tentatively concluded that oral argument would not be helpful to the Court in this case. The notice provided that any party might file a "Statement as to Need for Oral Argument." No such statements having been filed, the appeal has been submitted on the briefs and record alone pursuant to Fed. R. App. P. 34(a) and Circuit Rule 14(f).

ORDER

Lee, a former policeman with the City of Elmhurst, Illinois, appeals from the dismissal of his § 1983 claim against the deputy police chief and the City. The district court dismissed the complaint holding that Lee had not alleged any "liberty interest" within the meaning of the Due Process Clause. We affirm, although for a different reason than that enunciated by the district court.

I.

The plaintiff, Michael Lee, was a police officer with the City of Elmhurst until September 2, 1978 when he voluntarily left the force. More than a year later Lee sought a recommendation from the Elmhurst Police Department. Deputy Chief Bernt Monsen responded with a recommendation that contained both favorable and unfavorable material. Lee was rejected for a position with the DuPage County Sheriff's Department and was initially rejected by the Hawthorne, California Police Department. Lee then contacted the new Police Chief for Elmhurst, Illinois who issued a revised letter of recommendation which enabled Lee eventually to obtain employment with the Hawthorne Police Department.

Lee brought this action under 42 U.S.C. § 1983 alleging deprivation of a liberty interest. District Court Judge Crowley granted defendant's motion to dismiss stating,

> The plaintiff had no liberty interest protected by 42 U.S.C. § 1983 *after* he voluntarily left his employment. *Paul v. Davis*, 424 U.S. 693, 709 (1976); *Elbert v. Board of Ed. of Lanark*, 630 F.2d 509 ([7th Cir.] 1980). Any remedy plaintiff may have lies in a state tort claim.

Lee v. Monsen, et al., 80-C-6924 (N.D. Ill., June 17, 1981) (unpublished order).

This appeal follows.

II.

The district court's conclusion that no liberty interest could exist if the plaintiff had *voluntarily* left government employment stems from the court's reading of two cases. In *Paul v. Davis*, 424 U.S. 693 (1976) the Supreme Court rejected the claim that the publication and distribution of a list of suspected shoplifters constituted a deprivation of liberty. The Court held that the law "does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701. Thus evolved what this circuit has described as a "stigma plus" test for deprivation of liberty. *See Colaizzi v. Walker*, 655 F.2d 828 (7th Cir. 1981).

The district court also relied on *Elbert v. Board of Education*, 630 F.2d 509 (7th Cir. 1980), *cert. denied*, 450 U.S. 1031 (1981), in which this court rejected the § 1983 claim of a school superintendent where the school board had decided to terminate the superintendent but later changed its mind and retracted certain statements that had been made. 630 F.2d at 510-11. The court held that there could be no due process violation since insofar as he had maintained his employment no property right had been infringed; nor had any other right or status *other than reputation* been affected. 630 F.2d at 512-13.

We think neither *Davis* nor *Elbert* is broad enough to stand for the proposition that there can *never* be a liberty interest in connection with defamatory statements following the voluntary separation from government employment. In both *Davis* and *Elbert* there was no allegation that the plaintiff had suffered any loss of status. Thus, there was no deprivation of any status or right, other than a generalized interest in reputation, which the courts have held to be unprotected unless such a right is specifically conferred by state law. In the instant case, the plaintiff has asserted more than a loss of mere reputation. He asserted that the actions of the Elmhurst Police

Department resulted in the denial of tangible employment benefits. Construing the allegations of the complaint, which we must take to be true for purposes of a motion under Fed. R. Civ. P. 12(b)(6), we find the fact that plaintiff voluntarily left his employment insufficient, *by itself*, to defeat the possibility of a liberty interest.

Although the more typical case concerns the dissemination of adverse information about the employee following his discharge, we feel it is sufficient that the defamation occur in connection with, and be reasonably related to the alteration, voluntary or otherwise, of rights or interests. *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); *Dennis v. S & S Consolidated Rural High School District*, 577 F.2d 338 (5th Cir. 1978). However, there comes a point in time when post-termination publication of defamatory remarks becomes sufficiently remote from the termination of employment so as to eliminate the nexus required by the "stigma plus" test. *See Duggan v. Town of Ocean City*, 516 F. Supp. 1081 (D. Md. 1981). *Cf. Owen v. City of Independence*, 445 U.S. 622, 633-34 n. 13 (1980) (timing of publicizing of alleged defamation was a relevant factor in assessing existence of liberty interest). The passage of more than a year between Lee's resignation and his rejection for employment, under the facts of this case, suggests that no substantial nexus exists to create a protectible liberty interest.

Even if we assumed a sufficient nexus between Lee's resignation and the alleged defamation, we feel the district court acted properly in dismissing the complaint. As the Supreme Court has noted, the range of interests protected by the Fourteenth Amendment is not infinite. *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972). In order to succeed a plaintiff must allege the deprivation of a right or a status conferred by a source such as state law. *Paul v. Davis*, 424 U.S. at 711; *Roth*, 408 U.S. at 577; *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Bell v. Burson*, 402 U.S. 535 (1971).

Lee can point to no status or right in relation to the information contained in the recommendation conferred by the law of Illinois. In fact, state law suggests quite the opposite conclusion. Under Illinois law an employer enjoys a qualified privilege for charges of libel and slander concerning applicants for employment. *See Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill. 2d 345, 243 N.E.2d 217 (1968); *Roemer v. Zurich Insurance Co.*, 25 Ill. App. 3d 606, 323 N.E.2d 582 (1st Dist. 1975). *See generally* Annot., 60 ALR 3d 1080 (1974).

The essential elements of the privilege under Illinois law are 1) good faith by the writer; 2) an interest or duty to be upheld; 3) a statement limited in its scope to that purpose (employment); 4) a proper occasion; and 5) publication in a proper manner and to proper parties only. *Roemer*, 25 Ill. App. 3d at 613, 323 N.E.2d at 587; *Myers v. Spohnholtz*, 11 Ill. App. 3d 560, 297 N.E.2d 183 (1st Dist. 1973). If these elements are present, the privilege can be defeated only by a showing of actual or express malice on the part of the defendant. *Myers*, 11 Ill. App. 3d at 569, 297 N.E.2d at 188.

The allegations of Lee's complaint are insufficient to show either that the privilege does not apply or that it has been abused. Therefore, Lee's claim of a liberty interest is specifically rebutted by state law.

III.

For the foregoing reasons the order of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable John Powers Crowley.

Cause No. 80 C 6924 Date June 17, 1981

Title of Cause MICHAEL LEE v. BERNT A. MONSEN, et al.

The defendants' motion to dismiss is granted. The plaintiff had no liberty interest protected by 42 U.S.C. §1983 *after* he voluntarily left his employment. *Paul v. Davis*, 424 U.S. 693, 709 (1976); *Elbert v. Board of Ed. of Lanark*, 630 F. 2d 509 (1980). Any remedy plaintiff may have lies in a state tort claim.

/s/ JOHN POWERS CROWLEY
Judge

JUNE 18, 1981

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION FILE NO. 80 C 6924

Michael Lee

vs.

Bernt Monsen

JUDGMENT

This action came on for (hearing) before the Court, Honorable JOHN POWERS CROWLEY, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that judgment by dismissal is entered for the defendant and against the plaintiff. Enter judgment.

Dated at Chicago, Illinois, this 17th day of June, 1981.

H. STUART CUNNINGHAM
Clerk of Court

/s/ BARBARA J. BROTHERSON
Barbara J. Brotherson
Deputy Clerk

APPENDIX C

ELMHURST POLICE DEPARTMENT

RE: LEE, MICHAEL — OCTOBER 16, 1979
SS# 358-38-8289

Appointed to Elmhurst PD: 09-29-68

Terminated: 09-02-78

Served as patrolman, held position of evidence technician and platoon investigator.

Received several letters of commendation for good work.

Received two official commendations from department.

Received thirteen (13) disciplinary actions.

Received eight (8) suspensions in addition to the above.

Had extensive training in evidence work and did very good work in that field.

Had an excessive sick record.

Had an excessive late for duty record.

Evaluations cited him for a lack of initiative, challenging direction and supervision.

Resigned from evidence technician position.

Was removed from investigations section for lack of production.

Requested leave of absence to join police agency in Arizona on 08-07-78. Commission denied leave request due to disciplinary record of officer.

/s/ B. A. MONSEN
B. A. Monsen
Deputy Chief

Approved: M. J. MARTIN
Chief M. J. Martin

APPENDIX D

CITY OF ELMHURST
118 Schiller Street
Elmhurst, Illinois 60126
(312) 530-3050

ABNER S. GANET
Mayor

ROBERT T. PALMER
City Manager

MAURICE J. MARTIN
Chief

POLICE DEPARTMENT

December 12, 1979

Hawthorne Police Dept.
Hawthorne, California

Re: LEE, Michael

Dear Sir:

Pertaining to your request for applicant background on the above named subject, our files designate the following:

Appointed to Elmhurst PD 09-29-68

Terminated by resignation 09-02-78

Served as patrolman, held position of Evidence Technician and platoon investigator

Received several letters of commendation for good work

received two official commendations from department

received thirteen (13) disciplinary actions

received eight (8) suspensions in addition to the above

Had extensive training in evidence work and did very good work in that field

Had an excessive sick record

Had an excessive late for duty record

Evaluations cited him for a lack of initiative, challenging direction and supervision

Resigned from Evidence Technician position

Was removed from investigations section for lack of production

Requested leave of absence to join police agency in Arizona on 08-07-78. Commission denied leave of absence request due to disciplinary record of officer.

If we can be of any additional assistance to you on this matter, please do not hesitate to contact us.

Very truly yours,

/s/ BERNT A. MONSEN
Bernt A. Monsen
Deputy Chief

Approved: MAURICE J. MARTIN
Maurice J. Martin
Chief of Police

APPENDIX E

CITY OF ELMHURST
118 Schiller Street
Elmhurst, Illinois 60126
(312) 530-3050

ABNER S. GANET
Mayor

ROBERT T. PALMER
City Manager

MAURICE J. MARTIN
Chief

POLICE DEPARTMENT

January 15, 1980

TO WHOM IT MAY CONCERN:

Please allow this letter to serve as an introduction to Mr. Michael Lee. Mr. Lee served in the Patrol Division for eight (8) years from 9-29-68, during which time he brought credit to himself and our department many times, resulting in the issuance of many department commendations.

After service of eight years in this division, Mr. Lee was assigned to the Evidence Technician Unit. While in this capacity, he earned commendations for the expertise he developed in the field of crime scene processing techniques.

During the time Mr. Lee served in Patrol, he was rated on top of his platoon by both his supervisors and fellow officers. Mr. Lee was one of three outstanding officers from our department nominated for "Policeman of the Year" in 1971. He finished second in this award presentation.

Mr. Lee later was assigned to the Detective Unit for approximately 1½ years. He was advancing as an efficient investigator and was responsible for many significant case clear-ups. The combination of his experience in the field of evidence collection and processing, along with his ability to logically sort out the facts, helped him to excel in this field. It was about this time that he began experiencing some marital problems.

During his career with our department, Mr. Lee received 7 suspensions. He did not abuse his sick leave privileges. He had several long periods of leave which were with the approval of his attending physician. Mr. Lee never ran out of authorized sick leave.

I hope this letter will give you some insight into Mr. Michael Lee's career with us and should you have any further questions, please feel free to contact me.

Sincerely yours,

MAURICE J. MARTIN
Maurice J. Martin
Chief of Police

MJM/rvz

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL LEE,

Petitioner,

vs.

BERNT A. MONSEN, Deputy Chief of the Elmhurst Police Department, and CITY OF ELMHURST, ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

In a civil rights action brought under 42 U.S.C. § 1983 upon facts *in pari materia* with a common law tort, the defenses available to that common law tort are also available in a civil rights action.

ARGUMENT

I.

THE "STIGMA PLUS" TEST WAS PROPERLY APPLIED BY THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE.

A liberty interest of the ilk asserted by Lee must "occur in the course of the termination of employment." *Paul v. Davis*, 424 U.S. 693, 710 (1976). In this case, a period of *over one year* transpired between Lee's resignation and the allegedly defamatory remarks. As to such a length of time, the U.S. Court of Appeals held below:

> However, there comes a point in time when post-termination publication of defamatory remarks becomes sufficiently remote from the termination of employment so as to eliminate the nexus required by the "stigma plus" test.

Relative to this ruling Lee argues:

> However, the United States Court of Appeals * * * determine[d] that there must be a nexus between the post-termination publication of the defamatory remarks that is not sufficiently remote from the termination of employment.

The issue raised by Lee is whether the elapsing of one year's time from his departure from the police department to the time of alleged stigmatization satisfies the requirment that it "occur in the course of the termination of employment."

Lee would automatically apply Ill.Rev.Stat., ch. 83, § 16—the statute of limitations applied in statutorily based claims. However, as this Court stated in *United States v. Kubrick*, 444 U.S. 109, 115 (1979):

> Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

The statute of limitations is a statute of repose and does not define the elements of causes of action whether constitutional or common law. The five-year limitation determines the time from the incurrence of injury that the cause of action must be brought. It does not define the time relationship required under the Constitution or common law for maintenance of this action.

As the U.S. Court of Appeals for the Seventh Circuit said in *Hadley v. County of Du Page*, 715 F.2d 1238, 1246 (7th Cir. 1983):

> [t]here comes a point in time when post termination publication of defamation becomes sufficiently remote from the termination itself so as to make it no longer within "the course of termination of employment", thereby eviscerating the nexus required by the stigma plus test.

That standard is consistent with the spirit and tenor of this Court's prior rulings in *Paul v. Davis*, 424 U.S. 693 (1976) and *Codd v. Velger*, 429 U.S. 624 (1977). The Court below properly ruled that, as a matter of law, a putative stigmatization which occurred one year after a voluntary

resignation was *not* within the "course of termination of employment".

II.

A LIBERTY INTEREST IS SUBJECT TO THE SAME DEFENSES AS EXISTED AT THE COMMON LAW UPON FACTS *IN PARI MATERIA*.

As a second basis upon which the Petitioner seeks to have this Court grant *certiorari* Lee argues:

> Libel and slander are causes of action that relate to different type legal theories which are not liberty interest concepts that are founded upon constitutional grounds.
>
> * * *
>
> Therefore, the qualified privilege should not be the basis to bar a civil rights violation in terms of a liberty interest deprivation when there is more involved than an adverse publication affecting one's reputation—such as loss of employment resulting in a denial of a liberty.

Lee thus argues that common law defenses to libel and slander actions are of no import in liberty interest violations upon facts *in pari delicto*. For pall-mall abrogation of common law immunities to occur it would have had to have been *intended* by the legislature that passed 42 U.S.C. § 1983.

The legislative record gives no indication, however, that Congress, in passing 42 U.S.C. § 1983, intended to abrogate common law immunities as they then existed. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Instead, 42 U.S.C. § 1983, which was passed in 1871, has been held by this Court *not* to be read in derogation of common law tort immunities and defenses. This Court has instructed that 42 U.S.C. § 1983 is to be read *in harmony* with those immunities and defenses. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Imbler v. Pachtman*, 424 U.S.

409, 418 (1976). Thus, those defenses available at the common law in 1871 are available under 42 U.S.C. § 1983, today, upon facts *in pari materia*. *See, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

Relative to defenses to libel and slander actions, this Court long ago recognized in *White v. Nicholls*, 44 U.S. (3 How.) 226 (1845) certain "exceptions" or defenses to actions for libel and slander. The Court, after conducting an examination of the treatises and decisions, found among the "exceptions":

> 2. Anything said or written by a master in giving the character of a servant who has been in his employment. (*Id.* at 287)

In *White* the Court also found the state of the law as it then existed to be that a defense was offered whenever an:

> author or publisher of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral * * *. (*Id.* at 286)

These statements give proof of the birthright of both "good faith" and qualified privilege immunities for charges of libel concerning applicants for employment.

Further support of the long standing existence of these defenses comes from an examination of Nineteenth Century commentaries on the law. *See*, Newell, *The Law of Libel and Slander*, 389-94 (1898); Cooley, *A Treatise on the Law of Torts*, 251-52 (1888); Pollock, *A Treatise of the Law of Torts*, 335-38 (1894); Bishop, *Commentaries on the Non-Contract Law*, 128-31 (1889).

In the period that immediately followed the Civil War, as this issue came to be litigated in the various jurisdictions, "some type of privilege was recognized in twenty five of the twenty eight jurisdictions in which appellate

court decisions and public official libel suits were recorded." Lawhorne, *The Supreme Court and Libel*, nn. 31, 32 (1981). The defense with which Lee takes issue is venerable, having existed at the time of the passage of 42 U.S.C. § 1983.

This Court has on numerous occasions examined defenses existing at the time of passage of 42 U.S.C. § 1983. *See, Briscoe v. LaHue*, ... U.S. ....., 103 S.Ct. 1108, 1113 (1983)—witness immunity; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)—previously recognized defenses; *Owen v. City of Independence, Mo.*, 445 U.S. 622-638 (1980)—incorporation of compatible immunities; *Lake Tahoe Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403-05 (1979)—regional legislators; *Procunier v. Navarette*, 434 U.S. 555, 561 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 239-45 (1974); *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975)—good faith immunity; *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978)—judicial immunity; *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)—prosecutorial immunity. In no case has this Court abrogated a defense available under the common law at the time of passage of 42 U.S.C. § 1983.

The policy commanding application of privilege to statements made by a public official about the character of a previous employee is no less furthered by public policy than any of the aforementioned defenses and immunities, all of which were contemporaries in the pre-Civil War Era.

It would be a serious departure from these precedents to eviscerate the privilege, long recognized in Illinois, of an employer to comment upon the capacity of a former employee; particularly where the former employee seeks police work.

CONCLUSION

By reason of the foregoing, this Honorable Court should deny Michael Lee's Petition for Writ of Certiorari.

Respectfully submitted,

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